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Supreme Court, U.S.
FILED
APR 3 2001
CLERK

No. 00-1336

In the
Supreme Court of the United States

KENNETH KING,

Petitioner,

v.

STATE OF OHIO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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RESPONSE BRIEF IN SUPPORT OF PETITION
FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE STATE OF OHIO

REASONS FOR GRANTING THE PETITION

I. The Ohio courts violated King's right to confront his accusers.

In its Brief, the State asserted the following: "The trial court allowed the State to introduce the video tape of Ms. Selby's interview with Y.E., because Y.E. herself was unable to testify at trial that Petitioner committed the charged offenses." (Brief in Opposition to Petition for Writ of Certiorari at page 8.) This is exactly what happened during the trial. Y.E. did not identify King as committing any offense against her. Y.E. testified in pertinent part:

> "Q. * * * Do you know - - let me ask you this, Yvonne, last summer, were you ever at someone's house last summer where something happened that you didn't like to you?"
> A. No.
>
> * * *
>
> Q. * * * Do you remember being touched?
> A. No.
>
> * * *
>
> Q. * * * Were you ever at Ken's house, think real hard, when Kenny did something that you didn't like?

A. No.

* * *

Q. Okay. Yvonne, I want you to think real hard, can you think of any reason in your mind why you wouldn't like Ken, can you think of any reason?

A. I don't know.

* * *

Q. Do you remember being in someone's house where something got on you that you thought was yukky?

A. No.

Q. You don't remember that, okay. Yvonne, are you uncomfortable out here in Court sitting where you are sitting?

Q. No."

(Pages 347, 348, 351, and 353 of the trial transcript.)

Ohio Evidence Rule 807 codifies when hearsay statements made by an abused child are admissible.

> "By its own terms, Evid. R. 807 provides *what a trial court must find on the record*. First, *a trial court must find* "that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness * * *." Evid. R. 807 (A)(1). Second, *a trial court must find* that "[t]he child's testimony is not reasonably obtainable by the proponent of the statement." Evid. R.

> 807 (A)(2). Third, *a trial court must find* "independent proof of the sexual act or act of physical violence." Evid. R. 807 (A)(3). Finally, *a trial court must find* that the proponent of the statement fulfilled the notice requirements under Evid. R. 807 (A)(4). *Evid. R. 807 (C) also requires* a trial court to make findings of fact to support each of the general findings." (Emphasis added.)

State v. Said, 71 Ohio St.3d 473, 477, 644 N.E.2d 337, 341 (1994).

From the above record, the trial court could not find that Y.E.'s testimony was not reasonably obtainable. She testified–just not as expected by the State. She did not identify King as committing any offense against her. Additionally, the State did not fulfill the notice requirements.

The State has admitted that there are "four requirements for admission." (Brief in Opposition to Petition for Writ of Certiorari at page 11.) However, the State and the trial court have chosen to ignore these requirements.

The State then went on to argue that it could not know that a six-year-old child might not identify the alleged perpetrator in open court. This argument is absurd. How can a prosecutor claim that he had no idea that a *six*-year old might have problems testifying? Moreover, it is the position of King that Y.E. had no problems testifying. She chose to tell the truth; that King had committed no offense against her.

Additionally, the determination of a child declarant's availability is best made at a pretrial proceeding.

> "Evid.R. 807 contemplates that a pretrial hearing will be conducted at which time the ability of the child to testify should be addressed and an initial determination as to the admissibility of the child's statements should be made. This would allow both parties to prepare for trial in accordance with the trial court's ruling. A pretrial hearing would also permit an interlocutory appeal if the trial court's ruling on the child's availability and/or the admissibility of the child's extrajudicial statements so hinders the state's evidence that the state cannot proceed with its case. See *State v. Malinovsky* (1991), 60 Ohio St.3d 20, 573 N.E.2d 22."

State v. Storch 66 Ohio St.3d 280, 293, and paragraph two of the syllabus, 612 N.E. 2d 305, (1993).

Since the State wished to call Y.E., then it was incumbent on the State to request a pretrial.

Lastly, the State claims that substantial compliance with the mandates of the rule satisfy the Confrontation Clause, and that the lack of a request for a continuance by trial counsel somehow equates with a lack of prejudice. The lack of a request for a continuance is *per se* evidence of ineffective assistance of counsel. Additionally, the State was unable to point this Court to any citation support for its claim that substantial compliance is sufficient.

The State and the trial court did not follow the correct procedure, and consequently, violated King's right to confront the witnesses called to testify against him. Assuming that Ohio Evidence Rule 807 is a well-established exception to the

hearsay rule, then there is no confrontation right violation if there is compliance with the mandates of the rule. Since there was non-compliance, then the extrajudicial statements were not admissible. This is a *prima facie* violation of the Confrontation Clause of the Sixth Amendment.

In seeking to convict King, the State violated the delicate balance between a court's concern for the welfare of victims of child abuse and justice for those who are accused of such crime. The state court treatment of King violated this Court's pronouncements in *Idaho v. Wright*, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990) and *White v. Illinois*, 502 U.S. 346, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992).

II. The Ohio courts violated Kings' rights pursuant to the Compulsory Process Clause

To reach its preconceived notion of justice, the State has completely ignored the status of the law with respect to the Compulsory Process Clause. Likewise, the State completely ignored the reason for calling B.R. to the stand. King called B.R. in order to demonstrate to the jury the similarities in general appearance between King and B.R. In fact, B.R. better fit the description given by the alleged victims. This is permitted by the Ohio Supreme Court's decision in *Columbus v. Cooper*, 49 Ohio St. 3d 42, 550 N.E.2d 937 (1990), and this portion of that decision has not been overruled by *State v. Kirk,* 72 Ohio St.3d 564, 651 N.E. 2d 981 (1995). As in *Cooper*, the accused's intent in calling the witness included "afford[ing] the jury the opportunity to compare the physical appearance of [the accused] and [the witness] but not to get before the jury [the witness's] assertion of his Fifth Amendment rights." *Cooper, supra* at 47, 550

N.E. 2d at 941. B.R. should have been compelled, at the very least, to appear before the jury.

Further, in its brief the State indicated, "It was clearly in B.R.'s interests to assert his Fifth Amendment privilege against self-incrimination, where Petitioner was attempting to falsely blame him for the sex offenses perpetrated against Y.E." (Brief in Opposition to Petition for Writ of Certiorari at page 15.) Keeping in mind the State's cries that B.R. is innocent, how would it be in B.R.'s best interests to remain silent? Surely the State would not seek to prosecute B.R. when the State is certain he committed no crime.

III. King was not afforded the counsel guaranteed by the Sixth Amendment.

A. Counsel is ineffective when he failed to specifically object to the failure of the trial court to convene the Ohio Evidence Rule 807 hearing at least ten days prior to the trial.

The State's response to this issue is that trial counsel for King was made aware of the videotape in advance of trial. Therefore, there can be no ineffectiveness. This makes no sense.

The error was in not timely objecting to the problems created by the State when the State and the trial court refused to follow the proper procedure.

It is true that King, by and through his counsel, did not request a continuance. This is because the State and the trial court did not follow the proper procedures of Evidence Rule 807. Not having objected to these mandates, counsel failed

to protect King's constitutional rights to confront his accusers.

Likewise, these errors of the court were plain, and as such reversal is mandated.

B. Counsel is ineffective in trying a case when he could not hear.

The State claims that since there was additional defense counsel, that lead counsel was not ineffective when he could not hear large portions of the trial. This does not eviscerate the errors of trial counsel.

During preliminary remarks to the trial attorneys, the following discourse took place:

> "THE COURT: * * * Unless told differently, I will assume that the only attorneys who will make objections, when the other side is examining is Mr. Sheldon [for the State] and Mr. Paul [for King]." (Page 11 of the trial transcript.)

Only lead counsel, Mr. Paul, was permitted to raise objections. Not having done so due to his inability to hear, lead counsel prejudiced the rights of King. For example, lead counsel stated prior to delving into his cross-examination of Y.E.'s mother:

> "Q. * * * I have a hearing deficit, and many of the things you responded to questions I did not hear, but I did not want to interrupt what you were saying, so I just let it go, so please bear with me." (Page 104 of the trial transcript.)

The State cannot seriously claim that King was provided the counsel guaranteed to him by the Sixth Amendment.

C. The constitutional errors were not harmless.

In its final argument, the State claims that the constitutional errors alleged are harmless. In making this argument, the State makes two errors: first, the State cites this Court to the incorrect reviewing standard, and second, the State boldly proclaims that the DNA evidence is "conclusive."

First, any argument that the evidence would be merely cumulative is wholly unmeritorious. "In order to find constitutional error harmless, this court must find beyond a reasonable doubt that the error did not contribute to the verdict. *Chapman v. California* (1967), 386 U.S. 18, 24, 87 S.Ct. 824, 828 , 17 L.Ed.2d 705, 710-711." *State v. Johnson*, 71 Ohio St. 3d 332, 339, 643 N.E.2d 1098, 1105 (1994). If the hearsay or other inadmissible evidence could have affected the verdict, then the error is not harmless. *Johnson, supra.*

Here, the errors consisted of the presentation to the jury of testimony which was clearly inadmissible hearsay not firmly rooted in any exception. The errors also consisted in B.R.'s being permitted to assert his Fifth Amendment privilege against testifying outside of the jury–not even giving the jury an opportunity to view him. Lastly, the errors consisted of an attorney trying a case without the ability to hear the proceedings. All of these errors go to the very root of the criminal justice system.

Second, the DNA results are not conclusive. In fact, there was a third party's DNA present in some of the sampling (or alternatively, the sample was contaminated). This would be consistent with the claim of King that he did not sexually assault or otherwise molest or rape Y.E. This would be consistent with a third party having done so--perhaps B.R.

Cellmark Laboratories' employee, Lisa Grossweiler, testified that there is a possible third person's DNA or possible contamination.

> "Q. But again, this 1.3 is in there, we are talking about this technical artifact, which you do admit could be a third person?
> A. Yes, second person."

(Page 405 of the trial transcript.)

As the earlier briefing indicated, B.R. was named as a potential third party. The State chose to totally ignore B.R., and in fact, to protect B.R. by aiding in his assertions of his Fifth Amendment rights and in also seeking and obtaining the protection of his alleged privileges with respect to his psychological records. Simply stated, the State did not want all of the facts to come out. What cannot be explained whatsoever is the fact that B.R. was never tested to see if perhaps it was his DNA. There is no Fifth Amendment privilege against testifying with respect to the taking of blood or other bodily fluid samples. B.R. has a background which is consistent with someone who would be a sexual offender. A psychologist was ready, willing and able to testify as to what B.R. had said to that psychologist relative to the sexual assaults. This same psychologist was ready, willing and able

to testify as to the statements made by B.R. as to the innocence of Kenneth King with respect to the sexual assaults.

Despite all of this, the State did not seek to test B.R. Suffice to say, the DNA results are not conclusive as claimed by the State.

CONCLUSION

The Writ of Certiorari should be granted.

Respectfully submitted,

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